WILLS — REVOCATION — DUPLICATE WILLS — LOSS OF ONE OF TWO DUPLICATES IN POSSESSION OF TESTATOR. — The testator executed his will in duplicate, and took possession of both duplicates. Upon his death, one was found in his safe-deposit box. The other could not be found. *Held*, that the will be admitted to probate. *Matter of Shields*, 190 N. Y. Supp. 562 (Surr. Ct.).

Each duplicate is the last will of the testator. See *Odenwaelder* v. *Schorr*, 8 Mo. App. 458, 464. The will may be revoked by act to one of the duplicates, with an intent to revoke. Such intent has been inferred from the cancellation of one duplicate, though the testator had both in his possession. *Pemberton* v. *Pemberton*, 13 Ves. 302. See 1 JARMAN, WILLS, 6 Am. ed., *123. But see *Roberts* v. *Round*, 3 Hagg. Ecc. 548. The difficulty in the principal case is to determine whether the missing duplicate was destroyed with such intent. If the testator retain but one duplicate, the fact that it cannot be found at his death raises a presumption that he destroyed it *animo revocandi*. *Rickards* v. *Mumford*, 2 Phillim. 23; *Colvin* v. *Fraser*, 2 Hagg. Ecc. 266; *Matter of Schofield's Will*, 72 Misc. 281, 129 N. Y. Supp. 190. *Cf. Managle* v. *Parker*, 75 N. H. 139, 71 Atl. 637. Can a revocation be inferred when, as in the principal case, both duplicates have been retained, and one is missing? The disappearance of a will loses much of its significance when an equally valid duplicate remains intact in the testator's possession. Little is to be gained by saying that a presumption of revocation arises from the fact that one will is missing, and is rebutted by the fact that the other has been preserved. It is better simply to draw an inference from all the facts; and in the principal case it may fairly be inferred that there was no revocation.

BOOK REVIEWS

WAR GOVERNMENT OF THE BRITISH DOMINIONS. By Arthur Berriedale Keith. Being part of the Economic and Social History of the World War, British Series, published by the Carnegie Endowment for International Peace, Division of Economics and History. Oxford: Clarendon Press. 1921. pp. xvi, 354, (5).

The British Empire has always belied its name. "This realm of England is an Empire," declared a statute of Henry VIII with the Cæsarian flourish he loved; and if there was incongruity in adopting the term for an assertion of exclusive jurisdiction over his exiguous territory, there is no less in employing it to describe the congeries of free communities which form the Britannic Commonwealth to-day. The subjects of his successors made it most nearly applicable to reality when they had, as Seeley said, "conquered and peopled half the world in a fit of absence of mind"; but they carried with them their share of a tradition of free government that raised problems the solutions of which no Roman precedents could supply. The last hundred years witnessed the progress of Canada, Australia, New Zealand, and South Africa, by similar stages, to internal self-government, and the period since the outbreak of world war has seen them accorded a status of partnership with the United Kingdom and international recognition.

It is with the activities of their governments during the latter period, and the relations of those governments with that of the United Kingdom, that Mr. Keith's book deals. It gives a well-proportioned and lucid statement of complicated facts; his description of political operations and results is almost always exact, though a few *nuances* would doubtless have been different had it been possible for him to be closely in touch with local conditions so widely dispersed; but there are more serious objections to some of his statements and

inferences, which arise chiefly from a terminology that should be discarded because it describes a theory that is obsolete. It is sufficiently difficult to understand the Britannic political system with its legal dogmas controlled by established or developing conventions, and the difficulty is enhanced when terms are employed that obscure its realities.

Mr. Keith knows the details and admits the results of a steady course of development, which has been remarkable in the past few years only because it has been more rapid and possibly more obvious than before. He asserts the unfettered right of the nations of the Commonwealth to govern themselves; he recognizes that they "have come to claim and be accorded equal status within the Empire"; and he sees that the unity of the five partners is one "which depends ultimately on sentiment," or, as Mr. Meighen said last summer in England, on "common traditions, undivided allegiance, mutual loyalty." But he appears to be timid about the implications of all this, and seems to feel that unity threatened by the present results of a development which has been its real security. An "Imperial Parliament," whose "legislation can apply to a Dominion only with the full assent of that Dominion," and an "Imperial Government," which "so completely [respected] local autonomy . . that no interference was attempted by [it], even in regard to the military expeditions conducted by the Dominions and their occupation of enemy territory," are organs whose titles seem to want a good deal of explanation; and a confused use of the term "the Crown" to designate the King in his legal and constitutional position and relation to the whole Commonwealth and the governments and parliaments of the five self-governing partners, is an offence which should not have been repeated since Maitland discussed it.

"The Parliament of the United Kingdom (*sic*) was possessed of full sovereign authority of legislation, while the Dominion Parliaments had only a derivative authority granted by the Imperial Parliament," says Mr. Keith. "*The Canadian people*," said Sir Robert Borden in his Marfleet lectures, "accomplished Confederation by means of a statute enacted *at their instance* by the Parliament of the United Kingdom." The absence from that statute of any provision for its change by the Parliament of Canada is doubtless an inconvenient anomaly; but as it is one which can be rectified whenever the Canadian people desire to have a statute of the Parliament of the United Kingdom passed for the purpose, it scarcely justifies Mr. Keith's statement that "the problem of Imperial legislation presents itself with special acuteness in the case of Canada." For, as Sir Robert Borden said, "necessary amendments have been effected by that Parliament upon joint resolution of the Senate and Commons of Canada and no such amendment has been refused." "Thus," he added, "the legal powers of the Parliament of the United Kingdom have been utilized as a convienient means of effecting constitutional amendments." "The statutory translation of a parliamentary address from a self-governing Dominion, praying for a modification of its charter, is," as Mr. Meighen told the benchers of Gray's Inn, "but a circuitous method of legislation" — and he was not talking of Imperial legislation — "which, with our contempt for anomaly, we adopt until we find a better." That the Parliament of Canada would be unlikely to adopt a joint resolution for such an address against the views of the members from one of the Provinces which entered the union by virtue of what has sometimes been called a treaty, does not affect the essential truth of the last two statements. The territorial limitation on the legislative jurisdiction of the Dominion Parliaments is another anomaly, which is in process of being removed. Sir Robert Borden says the last word on this subject: "the Parliament of the United Kingdom has ceased to be an Imperial Parliament in any real sense so far as the Dominions are concerned. Its legal power is subject to the limitations of constitutional right." Surely it is the real sense of an intricate political system which is sought; and if, in order to preserve

the legal forms of a system encrusted with historical but generally harmless anomalies, the Parliament of the United Kingdom is constitutionally used as the primary legal organ for the establishment of law which will affect all His Majesty's subjects when the different Parliaments which are constitutionally entitled to legislate for them adopt it, or as an exalted registry office where legal validity is given to the constitutional expression of the political will of the electorate of another parliament of the Commonwealth, these things should be brought to light and not hidden under anomalous terms.

If the Parliament of the United Kingdom has ceased to be termed properly an "Imperial Parliament," the Government responsible to it is only less properly termed "Imperial." "By 1914," says Mr. Keith, "the rule had been effectively established that in all matters of internal government, the Dominions must be allowed the decision of the action to be taken, however much their policy might diverge from that which was adopted by the Imperial Government for the United Kingdom." The government of the United Kingdom has statutory power to disallow Acts of the Canadian Parliament; but, as Sir Robert Borden said, "the power of disallowance has not been exercised by the British Government for more than fifty years, and while it still has a legal existence it may be regarded as constitutionally dead"; it "is controlled and over-ridden by constitutional right." More difficult problems arise respecting the foreign relations of the Commonwealth, and their solutions lie not so much in abolishing or circumventing anomalies, as in overcoming mechanical obstacles. For historical reasons, which distance, and the consequent difficulty of periodic, not to speak of continuous conference, and even of frequent and full communication, involve, the conduct of the day to day relations of the whole Commonwealth with foreign states has been largely in the hands of the Government of the United Kingdom. At international conferences the Dominions are individually represented by plenipotentiaries appointed by the King on the advice of their own governments; and the negotiation of matters which concern that Dominion individually and the United States is conducted by Canada directly with the American Government, through the British Ambassador at Washington, or, by virtue of a treaty which provides for the investigation and arbitration of certain such matters, through a Commission, one half the members of which are appointed by the American Government and the other half by the King on the advice of the Canadian Government. The action of the King, as head of the Commonwealth, in respect of the external relations of the Dominions, is now taken on the constitutional advice of his Dominion Ministers. Because they reside in their respective Dominions, he is not immediately accessible to them, and, as such advice must reach him by some channel of communication, it is transmitted through a British Minister. But it is obviously confusing to say, as Mr. Keith does, that the action taken on such advice is taken on the advice of the British Minister who is made the channel of communication. If Mr. Keith means to imply that, on a matter concerning a Dominion only, the advice of the British Minister may over-ride that of the Dominion Ministers, something more may be endangered than the formal unity for which he is concerned. Fortunately no British Minister is likely to misapprehend his duty in such cases; if he requires guidance he will find a sound principle in the statement of Mr. Keith that "the functions of the Imperial Government and the Secretary of State for Foreign Affairs must, as regards communications from the Dominions to foreign powers or the League [of Nations], be *ministerial*, and the requests of the Dominions complied with without reserve." (As a matter of fact, communications to and from the League pass directly between it and the Dominion Governments.) A more serious question arises when the advice of a Dominion Ministry has reference to a matter which concerns, perhaps vitally concerns, all the partners of the Commonwealth. "It is obvious," as Mr. Keith says,

"that if Imperial unity is not to disappear, each Dominion must keep the Imperial Government and other Governments informed of its views," and that "it would be at least convenient if no action on any issue were taken, whether by the Imperial Government or a Dominion Government, before opportunity for objections or suggestions had been afforded." Periodic conferences are held, and communication of views is as full and frequent as distance will permit; but the increased and increasing intimacy and interdependency of international relationships, and the wider reaction and repercussion of events throughout the Commonwealth, make the most intimate consultation, which ought to take place before constitutional advice is tendered, increasingly essential to agreement. Surely, however, it is too facile to dispose of what Lord Milner called "one of the most complicated tasks which statesmanship has ever had to face," by saying that "the precise manner in which such consultation is arranged is only of secondary importance."

'The Crown' is a useful enough term to denote the head of the Commonwealth in his legal and constitutional position and relation to the other organs of government, but it should not be employed to give a specious definiteness to loose thought. Constitutionally the King is ubiquitous, but personally he cannot be; so, while he fulfills his functions in the United Kingdom in person, in the Dominions he must act by deputy. He may be said to have still another personality if he fulfills a function for the whole Commonwealth; but in all cases the function is that of 'the Crown,' — the King, acting (in person or by deputy) on the appropriate ministerial advice. The King is King of Canada, Australia, New Zealand, and South Africa, just as he is King of the United Kingdom, and the powers and functions of 'the Crown' subsist in each and all. A sentence of Sir Robert Borden's, which Mr. Keith quotes, puts the matter succinctly: "There is but one Crown, acting in each Dominion and in every Province and State upon the advice of Ministers responsible to the people and invested with their mandate." Therefore, though it is "the fact," as Mr. Keith says, "that the Crown possesses war prerogatives which extend . . . over all the Dominions and had not been delegated to Dominion Governments in the period before the war," there is more to be said for their exercise "on the advice of the Dominion ministry," where it affected the lives or property of His Majesty's subjects resident in a Dominion, than that their exercise "on the advise of the Imperial Government . . . would have resulted in undesirable friction with Ministries." The question of the exercise of one of these prerogatives arose during the war, and the Ministers of the Crown in the United Kingdom advanced the view that it could be exercised on their advice. The Ministers of the Crown in Canada, while informing their fellows in the United Kingdom that "it is needless to observe that any representations which [the latter] may submit as to the necessity or advisability [of exercising such prerogatives] will receive prompt and sympathetic consideration," formally made the constitutional position clear: "the question to be determined is not one of legal power but of constitutional right. This distinction is well recognized in the conventions which control the exercise of legislative powers. . . . The exercise of His Majesty's prerogative with respect to Canada must be governed by like considerations. . . . When the prerogative of the Crown is to be exercised . . . in respect to all matters which involve a contribution by citizens domiciled in [a Dominion], this prerogative must be exercised upon the advice of [the Dominion] Ministers and not upon the advice of the Government of the United Kingdom." 'The Crown' and its prerogatives subsist throughout the Commonwealth, in each Dominion as well as in the United Kingdom, and it acts, and they are exercised, upon the advice of Ministers responsible to the Parliament which represents the people who are affected thereby; it is neither the jewelled object lying in the Tower, nor a mysterious power over-riding the constitutional

authorities of the different parts of the Commonwealth, but a compendious term for a member of the constitutional machinery of each part, and of the embryonic but still amorphous contrivance by which the whole acts in unison, as well as a symbol of the historical traditions and constitutional unity of the peoples of the Britannic Commonwealth; whose Empire is no alien rule but their own self-government.[1]

A NEW CONSTITUTION FOR A NEW AMERICA. By William MacDonald. New York: B. W. Huebsch. 1921. pp. 260.

One who has spent some years in close communion with the Commerce Clause and the Fourteenth Amendment naturally feels apprehension in opening a book that boldly calls itself *A New Constitution for a New America*. It brings an empty feeling in the pit of the brain to think that some second growth of Founding Fathers may in a moment devitalize a considerable body of knowledge laboriously acquired and by a stroke of the pen reduce one from a lawyer to an historian. Yet if the public good requires it, the true patriot will not shrink from the ordeal. Mr. MacDonald's apocalypse must be viewed with unclouded eyes, however much it hurts. Even before the sedative delights of normalcy have fully restored to us our Old America, we will turn our gaze on a New America if Mr. MacDonald insists. Happily, however, he refrains from charting this New America except as it is to be created by his New Constitution. Thus our peace is not invaded in any such disturbing way as Cole and Tawney and Hobson and the Webbs ravish the quiet of Englishmen. If a New America is in time created by Mr. MacDonald, it will come *molliter* and indirectly through the ministrations of the paper changes that he proposes. Even these, when analyzed, are to the constitutional lawyer less drastic than the author's ominous title would lead him to fear.

To the practical politician, however, the new proposals are by no means negligible. Mr. MacDonald courageously disqualifies himself from becoming a public school-teacher in the state of New York so long as Chapter 666 of the Laws of 1921 continues to withhold a certificate from "any person who, while a citizen of the United States, has advocated, either by word of mouth or in writing, a form of government other than the government of the United States or of this state" (EDUCATION LAW, § 555 a). For Mr. MacDonald would have us abandon presidential government for cabinet government. The greater part of his study is devoted to the disadvantages of the former and to specification of the changes necessary to bring us the blessings of the latter. The president is to be so shorn of powers that invariably he can be no more than an amiable figurehead. Senators and representatives are to be elected for concurrent terms, some member of one house or the other is to lead them and to be replaced by a rival when he loses their confidence. The two chambers are to have co-ordinate authority, but what happens when they disagree is not considered. Thus the people are to rule as never before. Perhaps it is with thoughts of happy Britain that the author says: "Only by such changes can the nation rid itself of the one-man power which has become its bane, and recover the control of the government for the people themselves."

One who fears that full popular control may threaten the ancient liberties of minorities which our present Constitution guarantees will be glad to note that Mr. MacDonald does not ask us to give up the Fifth or the Fourteenth Amendment and that he declares explicitly that the Supreme Court should retain its present power to declare legislation unconstitutional. He would even increase these constitutional liberties by new clauses to remedy judicial mis-

[1] The author of the foregoing review prefers to have his name withheld. — ED.